Supreme Court, U.S.
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No. 98-1692

IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
a federally-recognized Indian Tribe
and BILLY CYPRESS,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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QUESTION PRESENTED

Respondent, South Florida Water Management District, restates the Questions Presented as follows:

Does the decision of the United States Court of Appeals for the Eleventh Circuit, that the district court did not abuse its discretion by granting summary judgment on the extensive record before it and denying Petitioners' request to foreclose entry of summary judgment in order to conduct discovery, create a conflict with decisions of other federal circuit courts sufficient to call for an exercise of this Court's supervisory power?

STATEMENT PURSUANT TO RULE 29.6

The South Florida Water Management District is a political subdivision of the State of Florida existing by virtue of Chapter 25270, Laws of Florida, 1949, and operating pursuant to Chapter 373, Florida Statutes and Title 40E, Florida Administrative Code, as a multipurpose water management district.

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Respondent South Florida Water Management District ("SFWMD") believes that the Court has already addressed and decided the question presented in the Petition and that there is neither non-compliance with settled Supreme Court law nor conflict among the federal circuit courts. Therefore, SFWMD respectfully requests denial of the Petition.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below:

On March 16, 1995, the Miccosukee Tribe and Tribal Chairman Billy Cypress (collectively the "Tribe"), filed suit in the district court against the United States, the United States Corps of Engineers ("Corps"), the Department of Interior and SFWMD, alleging violations of their Fifth and Fourteenth Amendment rights to Due Process and Equal Protection.[1] R1-1.[2] The Tribe sought declaratory and injunctive relief and to compel the defendants to relieve the flooding on the Tribal lands and remove the vegetation along the S-12-A-D structures. R1-1.

With its complaint, the Tribe simultaneously filed an Emergency Motion for Preliminary Injunction (R1-4), with exhibits, seeking removal of the vegetation behind the S-12

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1. The Tribe also asserted a violation of trust duties owed by federal defendants and a *Bivens* claim against two federal defendants in their individual capacities. Neither of these counts were against SFWMD.

2. Citations are to the record below, the Petition or the appendix filed with the Petition. References to the district court's docket sheet will be to volume number and docket entry by "R(volume no.) - (entry no.)" Citations to the Petition are indicated by "Pet." while the appendix is indicated by "App." followed by the appropriate letter and page number.

structures. All defendants opposed this motion (R1-11 to 29 (motions and affidavits)). Arguments on the motion were heard on March 27, 1995, and on March 31, 1995, the district court entered its Order denying the motion. R1-40. Thereafter, in May, 1995, the SFWMD and the federal defendants moved for summary judgment.[3]

On June 16, 1995, three months after filing suit, the Tribe filed a motion pursuant to Fed. R. Civ. P. 56(f) to foreclose entry of summary judgment based on what it perceived as an inadequate opportunity to conduct discovery. R3-65. The Tribe also filed a response in opposition to the summary judgment motions. R3-67. With its Rule 56(f) motion, the Tribe included one affidavit, document production requests and interrogatories. R3-65. The Tribe filed six additional affidavits and document production requests with its summary judgment response. R3-67.

In response, defendants opposed the Tribe's Rule 56(f) motion and also moved for protective orders staying discovery. R3-88 (SFWMD); R3-81, 85 (federal defendants). On August 16, 1995, the district court denied the Tribe's Rule 56(f) motion to foreclose entry of summary judgment. R3-97.

The district court recognized that Rule 56(f) allows a party to survive summary judgment if the party " 'presents valid reasons justifying his failure of proof.' " R3-97 at 3 (citing *Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir. 1989) (quotations omitted)). The court concluded, however, that

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3. In addition to the motions for summary judgment filed separately by the SFWMD and the federal government, individual Defendants Richard Ring and Barbara West filed a motion for summary judgment and a motion for dismissal for lack of personal jurisdiction. R2-47. Subsequently, the Tribe voluntarily dismissed the individual capacity claims against West and Ring. R4-107.

the Tribe's motion failed to carry its burden to present an affidavit which contains specific facts explaining how deferring disposition by summary judgment would allow the Tribe, through discovery or other means, to rebut the movant's showing that no disputed material facts exist. *Id.* The court concluded that the extensive record that had been generated in the case during the preliminary injunction stage was "more than sufficient" to resolve the issues raised on summary judgment, denied the Tribe's motion under Rule 56(f), and stayed discovery until the court ruled on the motions to dismiss and for summary judgment. *Id.* at 6. Thereafter, the Tribe moved to lift the stay (R4-115) and filed one supplemental affidavit. R4-116.

After the Tribe filed affidavits, exhibits and responses in oppositions to all motions for summary judgment and after the district court held a hearing on the motions, the court, on August 1, 1997, granted the defendants' motions for summary judgment, denied all other motions as moot, and entered judgment for the defendants. R4-122, 123. Initially, at the August 1, 1997 hearing, the court addressed the Tribe's renewal of its Rule 56(f) motion. R4-122 at 2, n.1. The court held that "[Petitioners'] counsel did not state what specific facts he expected further discovery to produce" and, once again, held that the Tribe failed to meet its burden to show any genuine issues of material fact remaining. *Id.*

Turning to the merits, the court first held that SFWMD is entitled to Eleventh Amendment immunity. R4-122 at 13-15. Next, the court held that the federal defendants did not breach their duty of trust to the Tribe. R4-122 at 16-19. Addressing the Tribe's Due Process challenges (R4-122 at 19-23), the court found no merit in the alleged violations of its rights: (1) to enjoy Tribal lands; and (2) to practice religion under the First Amendment. The court rejected the Tribe's argument that the federal defendants' failure to provide

certain requested flood relief violated a property interest of the Tribe and similarly rejected the assertion that the trust relationship between the United States and the Tribe gives rise to a "special relationship" under which the government has affirmative duties. Following this Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448-50 (1988), the court next rejected the Tribe's Free Exercise claim. *Id.* at 21-23.

Finally, the court rejected the Tribe's Equal Protection claim. Finding the statutes and operating criteria, under which the decisions were made not to grant the two flood relief requests, to be racially and ethnically neutral, the court looked to whether the decisions showed discriminatory purposes. *Id.* at 24. Noting that the Tribe presented evidence showing the defendants' actions adversely impacted them by prolonging the impacts on Tribal land, the court found no evidence that the defendants made their decisions because they would prolong the flooding. *Id.* The court specifically noted that the Tribe's "alleged proof of discriminatory purpose" merely recited the Corps' and National Park Service's decisions to deny the Tribe's requests where other agencies favored them. *Id.* at 24. Noting that "this evidence does not raise a genuine factual issue on the subject of discriminatory purpose," the court held that the Tribe's failure to show such discriminatory purpose was fatal to their claim. *Id.* at 24-25.

The Tribe filed a motion for reconsideration (R4-124) which the court denied on August 28, 1997. R4-129. On September 2, 1997, the Tribe filed its appeal with the Eleventh Circuit Court of Appeals. R4-130. The Eleventh Circuit Court of Appeals issued an opinion on November 19, 1998 affirming the district court on the claims of equal protection, due process and the trust doctrine, but not deciding the issue of whether the SFWMD was immune

under the Eleventh Amendment.[4] In its per curiam opinion, the court stated that the Tribe's due process and equal protection claims against the federal defendants and the SFWMD were identical. App. A at 5a. In addressing the claims against the federal defendants, the court relied on this Court's decisions in holding that the equal protection claim requires proof of discriminatory intent and the due process claim requires the Tribe demonstrate a "special relationship" between the Tribe and the governmental entity that gives rise to a governmental duty of care. App. A at 3a (citations omitted). The court found that "[t]he Tribe has not alleged any specific, nonconclusory facts that would enable it to prove these claims." App. A at 4a (citing *Crawford-El v. Britton*, 118 S. Ct. 1584, 1596-97(1998) (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)) ("[T]he court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.")

A subsequent Petition for Rehearing, stating the same arguments as presented in the Petition before this court, was denied. App. C at 47-48a. This Petition for Writ of Certiorari followed.

B. Statement of Facts

As described in the Tribe's Petition, in late August to October, 1994, central and south Florida received record

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4. The court recognized that the Eleventh Amendment immunity defense is a matter jurisdiction, but said it would address the merits of the case first since "it would benefit neither this court nor the parties to engage the immunity issue where doing so would only prolong this litigation without changing its inevitable outcome." App. A at 5a, n.1 (citations omitted).

rainfall.[5] R1-14. The Everglades in general, and more specifically, Water Conservation Area 3A ("WCA-3A") began experiencing high water conditions in August, 1994. R1-14. The already saturated ground condition was exacerbated on November 15, 1994 when Tropical Storm Gordon, a once in 50 year storm, drenched south Florida producing widespread rainfall and record high water levels. R1-14; R1-15. Due to the high water, the Tribe closed its federal Reservation[6] to the public (R4-122 at 7) and WCA-3A was closed to public access on September 29, 1994. *Id.* The heavy rains and Tropical Storm Gordon affected the Tribe, its lands, and its ability to plant crops and engage in traditional religious ceremonies. R4-122 at 9-10.

The Tribe claimed that flooding of the hammocks and tree islands in WCA 3A did not allow the Tribal members to

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5. The abnormally heavy rainfall began in May 1994. R1-15.

6. The Tribe has various south Florida land interests. R4-122 at 3-4. First, the United States holds in trust, reservation lands for the Tribe in the Everglades area outside the Everglades National Park. *Id.* No members of the Miccosukee Tribe live on the Reservation lands. Second, the Miccosukee Tribe, pursuant to a special use permit issued by the National Park Service, has the use and occupancy of a 333.1-acre tract of land located within the Everglades National Park (the "Permit Area"). *Id.* The Permit Area is where the Tribe's offices and most of the members' residences are located. R1-19. Third, east of and adjacent to the main reservation lies a 189,000-acre tract of land the Tribe has leased from the State of Florida (the "Leased Area") which is also located in the Everglades region but not within the Everglades National Park. *Id.* Both the Leased Area and much of the Miccosukee Reservation (50,000 acres) are located within "Water Conservation Area 3A" — a flood control area within the central and southern Florida project ("C&SF project") under the jurisdiction of SFWMD and the Corps. R1-14. Water Conservation Area 3A ("WCA-3A") lies to the north of Everglades National Park. The Tribe's flooding complaints are directed toward WCA 3A. R1-1.

practice their religion (an integral part of which is planting and harvesting of corn) and had adversely affected wildlife. R1-1. The Tribe claimed that the SFWMD's water control practices placed an unequal flooding burden on the Tribe. *Id.* First, the Tribe stated that the S-12A through D gate structures were not discharging to capacity since a vegetation barrier directly behind the structures allegedly impeded water flowing through the S-12 structures. *Id.* Second, the Tribe stated that throughout the Tribe's flooding crisis, the SFWMD maintained the S-333 gate structure at the southeast corner of WCA 3A closed and continued to keep it closed. *Id.*

The Tribe alleged that rather than allow water to flow naturally south into the Everglades National Park ("ENP"), the SFWMD chose to place the burdens of elevated water levels and persistent flooding on the Tribe. *Id.* The Tribe asserted that with the advent of South Florida's rainy season, flood levels on tribal lands had to be reduced substantially to make room for the expected increases in water levels throughout the Everglades. *Id.*

The Tribe first approached SFWMD about their concerns on October 17, 1994, well after flooding conditions in the WCA-3A had resulted in closing of the area to public access. R1-9 at ¶¶ 2-3; R1-12 (Terry) at ¶ 7; R3-67 at 8-9. Even though the SFWMD has at least a flowage easement over the entire Miccosukee Federal Indian Reservation and Tribal leased lands contained within WCA 3A, the SFWMD took all possible steps to alleviate flooding within WCA 3A. R1-13; R1-14; R1-16; R1-17.

At that initial meeting, SFWMD suggested a possible remedy would be to increase flows from WCA-3A through the S-12 and S-333 structures. R1-9 at ¶ 3; R3-67 at 9. Unknown at that time to the SFWMD representative who

made the suggestion, the S-12 structures were already fully open and the S-333 structure was required to be closed pursuant to the operating criteria.[7] R2-33 at 14, 18; R1-14 at 9-11; R2-54 at 3-4. In any event, notwithstanding SFWMD's genuine interest in addressing the Tribal concerns about the flooding, the Tribe was aware at all times that SFWMD had no authority to increase flows through the S-12 or S-333 structures and that such authority was vested in the Corps and ENP. R1-9 at ¶ 3.

Regarding the gates on the S-12 structures, primary outflow for WCA 3A, the gates were fully open and completely out of the water from September 18, 1994 until May 3, 1995. R-14; R2-54. On May 3, 1995, in accordance with the Corps' operating criteria, the S-12 gates were lowered from an approximate 12 foot opening to an approximate 1/2 to 1 foot opening. R2-54. The Tribe was notified of this action and agreed that it was appropriate since WCA 3A was drying out. *Id.*

Although the SFWMD did not open S-333 until March 21, 1995 (R1-14; R2-33), this was not a discretionary act. The operation of S-333 is regulated by strict operating criteria to protect the public interests by avoiding flooding of the Miccosukee native homes and the 8 1/2 square mile residential area.[8] R2-33. During November 1994, surveys

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7. The operating criteria are set out in the June 1993 Final Environmental Assessment for the Experimental Program of Water Deliveries to Everglades National Park ("EA"). The District Court had previously approved the EA in *South Dade Land Corp. v. Sullivan*, 853 F. Supp. 404, 409-10, 412 (1993). R2-40 at 6, n.4. R2-33 at 14, 18; R1-14 at 9-11; R2-54 at 3-4.

8. In their response, the Tribe asserted that ENP advocated opening the S-333 structure but that the Corps refused. R3-67 at 13; *see also id.* at 9. SFWMD notes that the affidavits cited do not support

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performed by the Dade County Office of Emergency Management found that the 8 1/2 square mile area had 12 to 18 inches of standing water with pockets up to five feet deep. R2-35. By March 21, 1995, water levels receded sufficiently to allow the opening of S-333 in accordance with the EA operating criteria. R1-14; R2-33.

During November 1994, in response to high water levels in WCA 3A, the South Atlantic Division of the Corps gave approval to the Jacksonville District, U.S. Army Corps of Engineers, for a temporary deviation from the approved regulation schedule of WCA 1 and 2A. R2-33. This allowed the Corps and the SFWMD to hold water levels one and a half feet higher in WCA 1 and one to three and a half feet higher in WCA 2A to avoid discharges into WCA 3A. R2-33; R1-14. These steps resulted in less water reaching WCA 3A. Additionally, since the end of July, 1994, Lake Okeechobee regulatory discharges had been made only through WCAs 1 and 2 without going into WCA 3A. R1-14.

Along with operational efforts, during Tropical Storm Gordon (November 15-17, 1994), the SFWMD worked cooperatively with the Corps to immediately alleviate localized flooding in the Tribe's village south of Tamiami Trail. R1-13; R1-16; R2-33. During the height of the storm, the SFWMD removed culverts and a section of the old U.S. 41 roadway in Dade County which was restricting flows to the south out of WCA 3A. *Id.* Also to alleviate high water levels in the Tribal village, the SFWMD added boards to the culverts at the S-12F structure to block westerly flow towards the Miccosukee village. *Id.* The SFWMD also removed flashboards at S-346, S-347 and G-71 to maximize discharge

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the factual assertion. Nevertheless, even accepting the assertion as true, it further demonstrates SFWMD's lack of involvement in the decisions about which the Tribe complained.

through the L-67 Extension located east of the village. R1-16. All of this was done in response to the Tribe's request to look at actions which could be implemented immediately to alleviate the high water conditions. R2-33.

In addition to the SFWMD's actions, the Corps placed earthen plugs between S-12A and S-12B to cut off the flow of water entering the Tribal village through the east-west borrow canal parallel to old U.S. 41. R1-26; R1-24 at ¶8. Subsequent observations revealed that the remedial efforts were successful since water levels had receded and the homes in the area appeared dry. R1-24 at ¶6.

Throughout their affidavits and papers, the Tribe averred and stated that SFWMD, at all material times, supported the removal of the vegetation below the S-12 structures. The Tribe also averred and stated that the decision not to remove the vegetation was made solely by federal actors, specifically ENP (or Richard G. Ring, Superintendent of ENP) and the United States Department of Interior (or Barbara West, Special Assistant to the Assistant Secretary of the Interior for Fish, Wildlife and Parks):

> [SFWMD] . . . favored removal of vegetation along the S-12 structures. The Superintendent of Everglades National Park, Richard Ring, rejected this proposal. Barbara West supported Ring's refusal. . . .
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> * * * *
>
> [SFWMD] . . . agreed that vegetation removal along the S-12 structures would assist in relieving the flooding of tribal lands. . . . Despite agreement by the . . . [SFWMD] on the need for vegetation removal behind the S-12 structures in order to reduce tribal flooding conditions, the officials

> from [ENP] and the Department of Interior refused permission to allow the vegetation removal and, to date, have prevented the Corps and [SFWMD] from taking steps to alleviate the flooding on tribal lands throughout the Everglades.

R1-9 at ¶¶8, 11; R1-12 (Terry) at ¶4; R1-12 (Jones) at ¶4.

> I personally know that [SFWMD] . . . advocated and strongly favored the vegetation removal behind the S-12 structures.
>
> The only parties who opposed and prevented the vegetation removal were ENP Superintendent Richard Ring and Barbara West of Department of Interior.

R4-116 at ¶¶5-6.

> The Army Corps and [SFWMD] have been ready to implement the solutions but have been prevented from doing so by [ENP] Superintendent Dick Ring and Interior's Office of Parks, Fish and Wildlife.

R3-67, Ex. G at 2. In addition to these sworn and evidentiary factual statements, similar statements are contained throughout the Tribe's papers filed in response to the various summary judgment motions. R3-67 at 11-13, 18, 27, 35-36 and n.16, 43; R2-64, ¶¶11,13,16; R2-62 ¶¶5,8).[9]

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9. The affidavits and arguments presented, as well as the evidence relied upon, by the Tribe clearly demonstrate that their claim was against the federal Defendants and that Petitioners had absolutely no good faith basis for bringing the action against

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REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. The South Florida Water Management District respectfully submits that this Petition should be denied.[10]

The Tribe alleges that the district court, after erroneously denying its Rule 56(f) motion to foreclose entry of summary judgment, prematurely granted summary judgment before "adequate" discovery. Pet. at 11. Contrary to the Tribe's allegations, since the Tribe failed to make a specific showing of the need for discovery under Rule 56(f), the district court did not abuse its discretion in granting summary judgment without discovery. *See United States v. Light*, 766 F.2d 394, 397 (8th Cir. 1985).

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SFWMD. *See Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993), *as amended*, 11 F.3d 1030 (11th Cir. 1994), *vacated in part on other grounds*, 115 S. Ct. 1203 (1995). Indeed, the relief which the Tribe sought clearly cannot be compelled from SFWMD, which admittedly lacks the authority to provide said relief. *See All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989).

10. The Tribe also argues that the Writ of Certiorari should be granted and this case remanded since the Eleventh Circuit "relied" on the intervening U.S. Supreme Court decision of *Crawford-El v. Britton*, 523 U.S. 574 (1998) in affirming the district court. However, contrary to the Tribe's argument, the Eleventh Circuit did not "rely" on *Crawford-El*, but in fact, cited to Rule 56(e) in finding that the Tribe had not alleged any specific, non-conclusory facts that would enable it to prove its claims. App. A at 4a. The cite to *Crawford-El* in the Eleventh Circuit opinion is dicta as the Eleventh Circuit relied on the explicit requirement of Rule 56(e) that summary judgment affidavits must set forth specific facts. *Id.* The Eleventh Circuit did not apply anything new that requires yet another bite at the apple.

There is no general right to discovery and Rule 56 of the Federal Rules of Procedure, which governs summary judgment, does not require trial courts to allow parties to conduct discovery before entering summary judgment. *Brown v. Chaffee*, 612 F.2d 497, 504 (10th Cir. 1979); *United States v. Bloom*, 112 F.3d 200, 205 n.17 (5th Cir. 1997); *Public Ser. Co. v. Continental Cas. Co.*, 26 F.3d 1508, 1518 (10th Cir. 1994); *Light*, 766 F.2d at 397. Abuse of discretion is only found where "the movant diligently pursued other discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment." *Qualls v. Blue Cross of California*, 22 F.3d 839, 844 (9th Cir. 1994). Moreover, the existence of Rule 56(f) shows that the Tribe's argument that it is per se improper to grant summary judgment without providing the opponent an opportunity to conduct discovery is without merit.

Rule 56(f) specifically addresses the question of summary judgment prior to discovery.[11] However, Rule 56(f) is not to be construed as a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. To survive a motion for summary judgment under Rule 56(f), a party must present " 'valid reasons justifying his failure of proof.' " *Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir. 1989) (quoting *Wallace v. Brownell Pontiac-GMC Co.*, 703 F.2d 525, 527 (11th Cir. 1983)). The party seeking to use Rule 56(f) " 'may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts,' but rather he must specifically

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11. Rule 56(f) provides: Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

demonstrate 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.' " *Wallace v. Brownell Pontiac-GMC Co.*, 703 F.2d 525, 527 (11th Cir. 1983) (quoting *Security & Exchange Comm'n. v. Spence & Green Chem. Co.*, 612 F.2d 896 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082 (1981)).

In its Rule 56(f) motion, the Tribe claimed that through discovery it would "become aware of numerous documents as well as meetings and conversations of the various defendants during the many months of the Tribe's flooding crisis." R3-65 at 3. The Tribe then claimed that this discovery would enable it to show a list of facts that would create a genuine issue of material fact. R3-97 at 4. As stated in the district court's Order on the Rule 56(f) motion, "a careful review of the list reveals that many of the entries relate to legal issues or factual matters that are not in dispute." R3-97 at 4. The district court found:

> For example, the entries regarding the water quality, the nature of the vegetation, and the benefits and consequences of removing the vegetation are either accepted as true by the defendants for purposes of the summary judgment motions or are immaterial to the issues raised. . . . Also, the matters concerning the Tribe's legal rights to exercise their religion and use of tribal lands are questions of law based upon documentation that is admitted [in volumes of evidence filed in connection with preliminary injunction] and controlling and is included as part of the record.

R3-97 at 4.

In reviewing the remaining entries on the Tribe's list, which allegedly would show a genuine issue of material fact as to the discrimination claim, the district court stated "it is far from clear how that information will enable the Tribe to show discrimination." R3-97 at 5. As to the Tribe's claim that discovery could show purposeful discrimination, the district court found that the requested discovery might "make the Tribe aware of more meetings and documents" but that the Tribe had not shown how that information would enable it to show discrimination. *Id.* at 5.

The Duncan affidavit, submitted by the Tribe in conjunction with the Rule 56(f) motion, merely alleged that the defendants had meetings that the Tribe was not invited to, and that documents related to these meetings would show purposeful discrimination. *Id.* The district court found this affidavit amounted to nothing more than a "vague assertion of unspecified information" which was "insufficient as it amounts to no more than speculation regarding the existence of probative evidence of the defendants' motivation for their actions." R3-97 at 5. Therefore, the district court denied the Tribe's motion finding that the volumes of evidence already in the record were "more than sufficient to determine the issues involved in the pending summary judgment motions." R3-97 at 4, 6.

On appeal to the Eleventh Circuit, the Tribe asserted that the district court made findings of fact without allowing the Tribe the opportunity to conduct discovery, but failed to show that the district court abused its discretion. As to discriminatory purpose, the Tribe asserted that discovery would show "defendants' purposeful discrimination against Plaintiffs based on their race and Indian heritage" and "defendants' purposeful disregard for Plaintiffs' religious freedoms and rights to use and occupy tribal lands." R3-65 at 3. These vague assertions do not specify any facts, they

merely draw legal conclusions much like alleging a need for discovery to prove "negligence." In both instances the Tribe has identified a general allegation it hopes to prove, but no specific facts it believes it will be able to discover. "Neither 'conclusory allegations' . . . nor brash conjecture coupled with earnest hope that something concrete will materialize is sufficient to block summary judgment." *J Geils Band Employee Benefits Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1251 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 81 (1996).

The Tribe's mere speculation and hope about what discovery might produce does not satisfy Rule 56(f); the Tribe is not entitled to conduct what is, at its core, a "fishing expedition." *Jarvis v. Nobel/Sysco Food Services Co.*, 985 F.2d 1419, 1422-23 (10th Cir. 1993). Rather, if the Tribe alleges that the SFWMD was improperly motivated, the Tribe must indicate specific facts constituting sufficient probative evidence from which a trier of fact could find such improper motive. *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 472-73 (9th Cir. 1991) (summary judgment proper in absence of sufficient evidence of racial animus).

The Tribe ignored the requirements of Rule 56 and its submission to the district court amounted to nothing more than vague assertions that the SFWMD had violated its rights and hopes that discovery would unearth concrete facts showing such violation. As the Eighth Circuit explained, "Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. . . . Where . . . a party fails to carry his burden, postponement of a ruling on summary judgment is unjustified." *Light*, 766 F.2d at 397.[12]

12. This Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and the Eleventh Circuit's decisions in *Jones v. City of*

(Cont'd)

CONCLUSION

For the reasons given above, and for those given in respondents', United States of America, United States Department of the Interior, and the United States Army Corps of Engineers, brief in opposition in this same case, the petition should be denied.

Respectfully submitted,

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Columbus, 120 F.3d 248 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1797 (1998), and *WSB-TV v. Lee*, 842 F.2d 1266 (11th Cir. 1988) which stand for the proposition that the summary judgment must be decided upon an adequate record, do not show the district court abused its discretion in this case. The district court expressly found that the record in this case contained extensive affidavit testimony and documentary evidence from the preliminary injunction, motions and hearing. The district court found that this evidence was "more than sufficient to determine the issues involved in the pending summary judgment motions." R3-97 at 6.